IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

MONDAY, THE 18TH DECEMBER 2006 / 27TH AGRAHAYANA 1928

Ex.FA.No. 39 of 2006()

AGAINST THE ORDER DATED 11/8/2006 IN EA 87/04 IN EP 75/03. IN AP.188/2000 OF DISTRICT COURT, KASARAGOD

APPELLANT/PETITIONER/3RD PARTY:

DEVAKI, AGED 54 YEARS,
D/O. RAMA, HINDU, LANDHOLDER, RESIDING IN
NEAR GOPALAKRISHNA HIGH SCHOOL, KUDLU VILLAGE,
KASARGOD TALUK P.O., R.D. NAGAR.

BY ADV. SRI.SURESH KUMAR KODOTH

RESPONDENTS: RESPONDENTS:PETITIONER & RESPONDENT:
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1. M/S. MAHARASTRA APEX CORPORATION LTD.,
MANIPAL, REPRESENTED BY ITS GENERAL POWER OF
ATTORNEY HOLDER, P.KUNHIRAMAN.

2. K. DEVADAS, S/O. RAMAN,
NEAR GOPALAKRISHNA HIGH SCHOOL, KUDLU VILLAGE,
KASARGOD TALUK, P.O. R.D. NAGAR.

R1 BY ADV. SRI.S.R.DAYANANDA PRABHU

THIS EXECUTION FIRST APPEAL HAVING BEEN FINALLY HEARD ON 18/12/2006, ALONGWITH EX.F.A.NO.43 OF 2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

I.A.NO.2110/2006 IN EX.F.A.NO.39/2006

DISMISSED

18/12/2006 SD/- K.T.SANKARAN, JUDGE

//TRUE COPY//

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K.T. SANKARAN, J.

EX.F.A. NOS. 39 & 43 OF 2006

Dated this the 18th day of December,2006

JUDGMENT

The first respondent, M/s.Maharashtra Apex Corporation Limited, is the decree holder in two arbitration proceedings, namely, A.P.Nos.186 of 2000 and 188 of 2000. In A.P.No.186 of 2000, award was passed on 10.3.2001 and in A.P.No.188 of 2000, award was passed on 20.12.2000. The Execution Petitions were filed before the Court of Civil Judge, Udupi and the decrees were transferred to the District Court, Kasaragod. E.P.No.76 of 2003 is in respect of A.P.No.186 of 2000 and E.P.No.75 of 2003 is in respect of A.P.No.188 of 2000. In both the cases, there are three respondents each in the Arbitration Proceedings. The common third respondent is Devadas. Execution Petitions were filed against Devadas for realisation of the award amount by attachment and sale of 13 cents of land belonging to him. Attachment was effected on 7.4.2001 and 20.3.2002. There is dispute regarding the date on which the attachment was made. However,

before the attachment could be effected, Devadas sold the property to his sister Devaki as per Ext.A1 assignment deed dated 1.1.2001. Devaki filed claim petitions in the Execution Petitions, under Order XXI Rule 58 of the Code of Civil Procedure. The executing court dismissed those applications. The Execution First Appeals are filed by Devaki challenging those orders.

2. The contention of the decree holder, M/s.Maharashtra Apex Corporation Limited, is that Ext.A1 assignment deed dated 1.1.2001 is a sham document and that it is intended to defeat and defraud the creditors. The assignor being the brother and the assignee his sister, the intention is very clear, the decree holder submits. The total consideration shown in Ext.A1 is only Rs.13,000/-. The appellant Devaki contended that the transaction is a genuine one and that she purchased the property for valid consideration. She denied the contention that the transfer was in defraud of creditors.

3. Before the court below, the appellant herein was examined as PW1 and on behalf of the decree holder, RW1 was examined. The evidence of PW1 would indicate that she has no idea where the property is. She does not know the survey number, extent and the four boundaries of the property. No basic tax receipt was produced by the appellant herein to prove that Ext.A1 document was acted upon and that the mutation was changed. There is no evidence to show that Rs.13,000/- was paid by Devaki to her brother Devadas. PW1 stated in cross examination that her bank passbook would indicate that the consideration was paid and the amount was withdrawn for that purpose. She stated that the bank passbook was lost. However, no step was taken by her to get necessary documents from the bank to show that she had enough funds in the bank and at the relevant time Rs.13,000/- was withdrawn by her. Ext.A1 is after the date of the award in A.P.No.188 of 2000. The award in A.P.No.186 of 2000 was passed on 10.3.2001, after the date of Ext.A1. It is clear that

the Arbitration Proceedings were pending much before the execution of Ext.A1 sale deed in favour of the appellant.

4. The court below dismissed the applications on the ground that Ext.A1 is a sham document. There is no finding in the orders impugned that Ext.A1 is a fraudulent document and that the transaction was entered into between Devadas and the appellant to defraud the creditors. It is well settled that a document could be declared as a fraudulent document at the instance of the decree holder in the execution proceeding itself and that no separate suit is necessary for that purpose. However, the court below has not rendered any finding that the transaction in question is a fraudulent transfer. Therefore, a fresh consideration of the entire matter is necessary, since no finding was arrived at by the court below that Ext.A1 is a fraudulent transfer. Accordingly, the orders impugned are set aside. The executing court shall dispose of the matter afresh after affording an

opportunity of being heard to both parties. The parties are free to adduce such other evidence as they wish to adduce. The Execution Applications (claim petitions filed by the appellant herein) shall be disposed of within a period of three months from the date fixed for appearance of the parties. The parties shall appear before the executing court on 15.1.2007.

The Execution First Appeals are allowed to the extent indicated above.

(K.T.SANKARAN)
Judge

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